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IN THE
COURT OF APPEALS OF INDIANA

ROY T. GARLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A04-0612-CR-724
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0606-FA-442

October 12, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Roy Garland (Garland), appeals his conviction for child molesting, a Class B felony, Ind. Code § 35-42-4-3.

We affirm.

ISSUE

Garland raises one issue on appeal, which we restate as follows: Whether Garland's sentence is appropriate in light of the nature of the crime and his character.

FACTS AND PROCEDURAL HISTORY

Between January 1998 and July 1998, Garland placed his finger in the vagina of N.B. N.B., ten to eleven years of age at the time, is Garland's granddaughter.

On June 6, 2006, the State filed an Information charging Garland with Count I, child molesting, as a Class A felony, I.C. § 35-42-4-3(a)(1); and Counts II and III, child molesting, as Class C felonies, I.C. § 35-42-4-3(b). On November 13, 2006, the State filed an amended Information changing Count I from a Class A felony to child molesting as a Class B felony, I.C. § 35-42-4-3(a). On the same date, Garland pled guilty to the amended Count I; in exchange, the State dismissed Counts II and III, as well as agreed to not file any additional charges. The plea agreement left sentencing to the trial court's discretion. On December 12, 2006, the trial court sentenced Garland to eighteen years, noting Garland' physical disabilities, poor health, and N.B.'s request that the trial court impose the minimum sentence as mitigating factors, while noting his criminal history and violation of a position of trust as aggravating factors.

Garland now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Garland contends the trial court's imposition of an eighteen-year sentence is inappropriate in light of the nature of the offense and his character. As support for his argument, Garland argues his offense is not the worst of the worst offenders, as he used no excessive force and caused N.B. no injury. Pertaining to his character, Garland notes he has an insignificant criminal history consisting of two previous misdemeanor convictions.[1] Therefore, Garland generally claims his sentence is excessive and should be revised.

A. *Standard of Review*

In evaluating Garland's contention, we must first address a recent change in Indiana's criminal sentencing scheme. Our legislature responded to *Blakely v. Washington*, 542 U.S. 296 (2004), by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. *Weaver v. State*, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), *trans. denied*. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" *Id.* (quoting I.C. § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence was required to be supported by *Blakely*-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the

[1] We note Garland alleges he has only one prior misdemeanor conviction; however, our review of his Pre-Sentence Investigation Report indicates otherwise. Specifically, it appears Garland was previously convicted of misdemeanor battery and public intoxication.

presence or absence of aggravators or mitigators.

In the instant case, Garland committed the crime of which he was convicted before the date the new sentencing scheme took effect, but was sentenced after this date. Although our supreme court has not yet definitely addressed the question whether the advisory sentencing scheme should be applied retroactively, it has nevertheless indicated its view on the issue. In footnote 4 of *Gutermuth v. State*, 686 N.E.2d 427, 435 n. 4 (Ind. 2007), our supreme court stated:

> The General Assembly responded to the decision in *Smylie* by changing our state's sentencing statute to replace "presumptive" with "advisory" sentences. We noted this change in a footnote in a recent opinion. We stated that "[w]e apply the version of the statute in effect at the time of Prickett's sentence." *Prickett v. State*, 856 N.E.2d 1203, 1207 n.3 (Ind. 2006). This language has appeared to cause some confusion. In *Prickett*, both the crime and the sentencing pre-dated the enactment of the new regime. This was not meant to question the long-standing rule that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime. *Smith v. State*, 675 N.E.2d 693,695 (Ind. 1996) (citing *Jackson v. State*, 257 Ind. 477, 484, 275 N.E.2d 538, 542 (1971)). Because both the crime and the sentencing in *Prickett* pre-dated the enactment of the new regime, the same statue was in effect at the time of Prickett's sentence and his crime. Had the new statute become effective between the date of Prickett's crime and his sentencing, the version of the statute in effect at the time of Prickett's crime would have applied.

While we acknowledge that "footnotes are comments upon the text rather than a part of it," such footnotes are indicative of an intent to benefit the bench and bar, and are deserving of "respect from an intermediate court and require [] special consideration." *Ewing v. State*, 358 N.E.2d 204, 206 (Ind. Ct. App. 1976); *see also Townsend v. State*, 860 N.E.2d 1268, 1274 (Ind. Ct. App. 2007), *trans. denied*. In light of our supreme court's clear intent approving that any sentence imposed after April 25, 2005, must be viewed under the

pre-existing sentencing scheme if the offense for which the sentence is being imposed was committed prior to April 25, 2005. Thus, we will review Garland's sentence under the presumptive sentencing scheme.

Garland's sole challenge on appeal is under Indiana Appellate Rule 7(B), which provides for an independent appellate review in light of the nature of the offense and the character of the offender. *See Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006). Garland was convicted of one Count of child molesting, as a Class B felony. A Class B felony carries a presumptive sentence of ten years, a minimum sentence of six years, and a maximum sentence of twenty years. The trial court sentenced Garland to eighteen years, a sentence that is eight years beyond the presumptive sentence. As previously stated, the trial court imposed this enhanced sentence based on its findings that Garland has a prior criminal history and was in a position of trust to his granddaughter, N.B.

Our review of the record leads us to conclude the trial court's imposition of an enhanced sentence is appropriate in light of the nature of the crime alone. The probable cause affidavit reveals Garland molested N.B. – his own granddaughter – on several occasions. During these incidents, Garland was entrusted with the care of N.B. at his residence for overnight stays. Garland clearly violated his position of trust with N.B. Further, we agree with the trial court's statement at the sentencing hearing that "the pain and suffering from child molestation [does not ever end] . . . for a victim or a victim's family." (Transcript p. 43). Moreover, Garland's argument that his sentence should be reduced because he did not physically injure N.B. bars on absurdity. He physically violated N.B., and

without question, he left a lasting injury on her psyche. For these reasons, we find Garland's eighteen-year sentence is not inappropriate despite his limited criminal history.

CONCLUSION

Based on the foregoing, we conclude the sentence imposed by the trial court is not inappropriate.

Affirmed.

NAJAM, J., and BARNES, J., concur.